Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JOHN LYNN, individually and as a Town of Clarkstown Police Officer, and DANIEL WEISBERG, individually and as a Town of Clarkstown Police Officer,

Petitioners,

vs.

ERNESTO MURPHY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

REASONS FOR DENYING THE WRIT

POINT A. THERE IS NO CONFLICT WHATEVER AMONG CIRCUITS -- CASES DISTINGUISHED 1

POINT B. THERE IS NO DISPUTE THAT A 42 U.S.C. 1983 SUIT, FOUNDED ON AN IMPERMISSIBLE FOURTH AMENDMENT SEIZURE, UNBROKEN AS A RESULT OF PERJURY AT THE GERSTEIN HEARING, MAY PROPERLY LIE IN MALICIOUS PROSECUTION 4

POINT C. THE SECOND CIRCUIT DID NOT BASE ITS HOLDING HEREIN ON THE SIMPLISTIC PROPOSITION THAT EVERY CRIMINAL

DEFENDANT IS "SEIZED" IN EVERY CRIMINAL CASE FOR SO LONG AS CRIMINAL PROCEEDINGS ARE PENDING 5

POINT D. SIGNIFICANTLY, HEREIN, A PETIT JURY CREDITED AS TRUE RESPONDENT'S ALLEGATIONS OF LACK OF PROBABLE CAUSE AND SUBSEQUENT PERJURIOUS GERSTEIN PROCEEDINGS 7

POINT E. AT TRIAL, PETITIONERS FAILED TO OFFER EVIDENCE OR CONTEST RESPONDENT'S ALLEGATIONS OF PERJURY AND FRAUD DURING GRAND JURY PROCEEDINGS 9

POINT F. PETITIONERS ATTEMPT TO DESCRIBE THE SECOND CIRCUIT'S FINDING OF IMPERMISSIBLE SEIZURE AS BASED SOLELY ON THE RIGHT TO TRAVEL IS ENTIRELY ERRONEOUS 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807 (1994) 4, 10

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986) 12

Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689 61 L.Ed.2d 433 (1979) 12

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979) 4

Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) 4

Colon v. City of New York, 69 N.Y. 2d 78, 83-83, 468 N.Y.S.2d 453 (1983).....11

Dunn v. Blumstein, 405 U.S. 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274 (1972) 12

Gerstein v. Pugh, 420 U.S. 103, (1975).....2,6,10,11

Marshall v. Sullivan, 105 F.3d 47 (2d Cir. 1996) 11

Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996) . . 1,4

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997) 2

United States v. Guest, 383 US 745, 86 S.Ct. 1170 (1966) 12

Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996) . . . 3,12,13

FEDERAL STATUTORY LAW

42 U.S.C. Sec. 1983.....4,9,13

UNITED STATES CONSTITUTION

Fourth Amendment 3,7,9.11

Fourteenth Amendment.....1,6

NEW YORK STATE STATUTORY LAW

Penal Law §120.05 (Felony Assault, 2nd degree) 8,9

Penal Law §120.00 (Misdemeanor Assault, 3rd degree) . . . 8

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT WHATEVER AMONG CIRCUITS - CASES DISTINGUISHED

In order to buttress their narrowly focused argument, Petitioners claim that a conflict exists between several circuits, sufficient enough, they opine, for this Court to address the purported schism.

The conflict articulated by Petitioners, however, is merely a mismatched patchwork of three (3) clearly distinguishable cases, a make-weight, straw man proffered in order that Petitioners might argue that a conflict exists.

For example, Petitioner's acknowledge that Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996) addressed an unlawful confinement, *not a Fourth Amendment seizure*. As such Reed is clearly distinguished from the instant case.

Moreover, the Seventh Circuit dismissed Reed, because "there were no allegations that the detectives committed any improper acts after arresting Reed without probable cause. We fail to see how this is malicious prosecution."

Contrariwise, here, Respondent alleged a Fourth Amendment seizure resulting from an arrest without probable cause as well as perjury and other falsity by the Police during the *Gerstein*[1] stage. More significantly, a petit jury concluded in its verdict that such allegations were true.

Obviously, there is a clear distinction between the instant case and Reed.

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997), also cited by Petitioners to support their concept of conflict, is clearly inapposite. Although couched as Malicious Prosecution, the Fourth circuit determined that *Riley* involved no Fourth Amendment seizure, as Riley was an excessive force Claim of a pretrial detainee under the Due Process Clause of the Fourteenth Amendment, Id. at 1162. Nor, in Riley, were there any allegations of perjury or malfeasance during the course of the Gerstein proceedings.

The Fourth Circuit granted Summary Judgment in *Riley* because the Fourth Amendment does not apply to conditions of confinement after a seizure has been made.

Obviously, again, the allegations herein are clearly distinguishable from those in Riley. Thus, there is no conflict between the instant case and Riley.

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1. Gerstein v. Pugh, 410 U.S. 130 (1975)

The final case cited by Petitioners to establish 'conflict', is the Eleventh Circuit's decision in Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996). Astoundingly, Whiting is clearly *in agreement* with the Second Circuit's Decision in Murphy I.[2].

Far from issuing a decision that in any fashion conflicts with the instant case or other circuits, Whiting agrees that a Section 1983 Plaintiff may maintain a cause of action if he/she can establish a concrete violation of his/her Fourth Amendment privileges, holding further, as did the Second Circuit herein, "***under analogous malicious prosecution principles, injuries caused by the unlawful seizure may include those associated with the prosecution", where the said continuing injury is proved to be caused by the acts of the Defendants. Id. at 586.

Thus, after careful analysis of the proffered 'conflicting' decisions in other circuits, it is apparent that no conflicting cases or theories have been offered by Respondents as to the maintenance of a properly alleged and proven Section 1983 claim of Malicious Prosecution. There may be, as Petitioners point out, many false claims. However, inapplicability of Section 1983 to one or many claims, does not vitiate Section 1983 claims in the appropriate case, as here.

2.Respondent's case herein was originally dismissed in the District Court on Limitations Grounds, only to be remanded by the Second Circuit since Malicious Prosecutions only accrue *after* favorable termination in favor of the accused.

B. THERE IS NO DISPUTE THAT A 42 U.S.C. 1983 SUIT, FOUNDED ON AN IMPERMISSIBLE FOURTH AMENDMENT SEIZURE, UNBROKEN AS A RESULT OF PERJURY AT THE GERSTEIN HEARING, MAY PROPERLY LIE IN MALICIOUS PROSECUTION

There cannot be, and has not been, any argument by Petitioners, that, based on the current state of the law, a suit alleging Malicious Prosecution as a Fourth Amendment violation may not properly lie pursuant to 42 U.S.C. Sect. 1983 where, as here, there is a Police seizure without probable cause, which impermissible seizure is unbroken by a Gerstein hearing as a result of police perjury and otherwise tainted Grand Jury proceedings, and where there is an ultimate termination in favor of the Accused. See, e.g. Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807; Brower v. County of Inyo, 489 U.S. 593, 596, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989); Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1871, 60 L.Ed.2d 447 (1979).

Indeed, one of the purported 'conflicting' cases cited by Petitioners, Reed v. City of Chicago, 77 F.3d at 1053, holds, inter alia:

> "It is conceivable that a wrongful arrest could be the first step towards a malicious prosecution. However, the chain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements by the officers to the prosecution."

In the instant case, not only did Respondent allege wrongful deprivation of personal liberty as well as perjury and other illegality by the police at the subsequent Grand Jury proceedings, but Respondent presented evidence of such impermissible activity by the police to a petit jury, which evidence, although disputed by Petitioners, was credited by the petit jury by their verdict in favor of Respondent. (See Section D, hereinbelow.)

C. THE SECOND CIRCUIT DID NOT BASE ITS HOLDING HEREIN ON THE SIMPLISTIC PROPOSITION THAT EVERY CRIMINAL DEFENDANT IS SEIZED IN EVERY CRIMINAL CASE FOR SO LONG AS CRIMINAL PROCEEDINGS ARE PENDING.

Petitioners leading argument, i.e., that the Second Circuit's Decision herein would consider every Defendant "seized" so long as criminal proceedings are pending, is erroneous.

The decision Below clearly demonstrates that the Second Circuit thoroughly sifted through the factual underpinning of the instant case and found that the impermissible Fourth Amendment seizure was unbroken by the Gerstein hearing, due to police perjury in the Grand Jury, resulting in a tainted indictment.

The Second Circuit found, inter alia:

> "In the present case, Murphy was arrested on November 13 without a warrant,

and he spent that night in jail. No judicial proceedings preceded Murphy's arrest or detention; and after his arraignment on November 14, following defendant's filing of the accusatory instruments against him, he was not again incarcerated. (Second Circuit Opinion, Petition, A-13),

"***where there is a dispute as to the pertinent events, the existence vel non of probable cause is to be decided by the jury. (Citations omitted). (The Jury's) verdict in Murphy's favor means that it found an absence of probable cause ***, Id, at A-19,

"Defendant's also argue that the jury's finding of no probable cause was impermissible because a presumption of probable cause arises from the grand jury's return of an indictment. That argument, however, is not properly before us since defendants did not raise it in the district court." Id. at A-20.

Citing this court's holding in Gerstein, the Second Circuit recognized herein that the liberty deprivations regulated by the Fourth Amendment are not limited to physical detention:

"Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships...Even pretrial release may be accompanied by burdensome

> conditions that effect a significant restraint of liberty." (Gerstein 420 U.S. at 114)

As a result of violation of his Fourth Amendment rights, Respondent claimed to have suffered various damages, only one amongst several of which was a restriction of his fundamental right as a United States citizen to freely migrate between the several states.

D. SIGNIFICANTLY, HEREIN, A PETIT JURY CREDITED AS TRUE RESPONDENT'S ALLEGATIONS OF LACK OF PROBABLE CAUSE AND SUBSEQUENT PERJURIOUS *GERSTEIN* PROCEEDINGS

Not only did Respondent, as above said, properly plead an impermissible seizure followed by perjured Gerstein testimony, but Respondent went the other nine yards and *proved the truth of such allegations to a petit jury.*

The proof presented by Respondent to the petit jury described a protracted episode of malfeasance, criminality, and subsequent cover-up by the Petitioners/Police Officers, making it clear to the petit jury that, but for Petitioners' perjury in the Grand Jury, Respondent would never had been indicted.

Respondent and his independent witness testified about the unjustified, senseless physical violence and racist taunts to which Officer Lynn subjected Respondent on a deserted stretch of road in the dead of night.

The trial evidence made it clear that Officer Lynn was relying upon his position as a police officer and his knowledge of police and court procedures to shield him from criminal and civil liability.

P.O. Weisberg also exhibited extreme malice and criminality in the prosecution of Respondent. Testimony was offered to the petit jury that at the time and place of occurrence, Officer Weisberg, without provocation, punched Respondent at least twice in the face as Respondent was pinned by other police officers to the hood of a police car.

Although Officer Weisberg conceded at the civil trial herein that he never saw Respondent hit, kick, or otherwise strike any police officer, Weisberg's testimony at the Gerstein hearing caused Respondent to be Indicted for the felony of Assault in the Second Degree (a felony under New York Law) for causing a *fracture* of Officer Weisberg's thumb.[3]

Significantly, Officer Weisberg's certified police medical records, received in evidence at trial in the District Court, clearly established that Officer Weisberg had suffered merely a sprain, NOT A FRACTURE, of his thumb. Such misrepresentation (read perjury) by Weisberg to both the Grand and Petit juries was further proof that Officer Weisberg intentionally fabricated and exaggerated his injuries in order to cause Respondent to be prosecuted for felony, rather than misdemeanor assault.

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3. Under New York Law, a fracture would constitute serious physical injury, an element of the felony Assault in the Second degree, while a sprain would constitute only physical injury, an element of Assault in the third degree, a misdemeanor.

As part of the rationale stated in the majority opinion of the Second Circuit in the instant case, that Court stated, inter alia, (appearing in Petitioner's Brief, A-19):

> "Here, the events were sharply disputed, the issue of probable cause was properly put to the jury, and the decision as to whose version to credit was entirely within the province of the jury. The jury was instructed *it could not return a verdict in favor of Murphy unless it found, inter alia, "the absence of probable cause" for the criminal proceeding against him.* Its verdict in Murphy's favor means that it found an absence of probable cause, a finding that the jury plainly chose to credit Murphy's version of events. [Emphasis original]

Thus, not only did Respondent submit pleadings which could survive Fourth Amendment and Section 1983 scrutiny, *Respondent offered evidence of such impermissibility to a petit jury, which petit jury, in its verdict, credited Respondent's version as true.*

E. AT TRIAL, PETITIONERS FAILED TO OFFER EVIDENCE OR CONTEST RESPONDENT'S ALLEGATIONS OF PERJURY AND FRAUD DURING GRAND JURY PROCEEDINGS

Petitioner's have mischaracterized the Second Circuit's majority decision herein as essentially adopting the theory set forth in Justice Ginsburg's concurring opinion in

Albright ... in holding that a criminal defendant is seized for Fourth Amendment purposes for so long as criminal charges are pending. (Petitioners's Brief at 4).

Petitioners's proposition is wholly defective for two reasons.

First, and most fatally for their argument, Petitioners fail totally to take into consideration that Respondent alleged in his pleadings perjury and other falsity by the Police Officers/Petitioners at the Gerstein hearing.

In addition to mere allegations, Respondent submitted proofs to the petit jury, including certified medical records, proving that Petitioners committed perjury in the grand jury which resulted in a tainted Indictment and extended (continued) the unjustified felony prosecution of Respondent.

Obviously, the initial impermissible seizure herein was NOT attenuated, broken, by the Gerstein hearing; rather, it was continued by way of the perjury of Petitioners.

The Second Circuit clearly noted in its majority opinion (at A-19) that the petit jury was instructed that it could not return a verdict in favor of (Respondent) unless it found the absence of probable cause. As noted by the Second Circuit, "the petit jury credited the testimony that Murphy's conduct was not provocative and that Lynn's conduct was intemperate, physically abusive and out of control..." (See Second Circuit Majority Opinion, A-20).

Although the Grand Jury indictment herein created a presumption of probable cause, the "presumption (was)

overcome by evidence that the indictment was the product of fraud, perjury, the suppression of evidence by the police, or other conduct undertaken by the police in bad faith." Marshall v. Sullivan, 105 F.3d 47, 54 (2d Cir. 1996); Colon v. City of New York, 60 N.Y.2d 78, 82-83, 468 N.Y.S.2d 453, 455-56 (1983); See also, Majority Opinion, Second Circuit, herein, A-20).

The second defect in Petitioner's narrow reading of the Second Circuit's holding is based on the fact that such argument *was not raised in the district court nor was any contrary evidence submitted to the petit jury* in connection with Respondent's claim of tainted grand jury proceedings, and was, therefore, NOT properly brought on appeal. (See Majority opinion, A-20)

F. PETITIONERS ATTEMPT TO DESCRIBE THE SECOND CIRCUIT'S FINDING OF IMPERMISSIBLE SEIZURE AS BASED SOLELY ON THE RIGHT TO TRAVEL IS ENTIRELY ERRONEOUS

To support their argument, Petitioner's have also submitted that the Second Circuit decision was based solely on the restriction of Respondent's Right to Travel.

The Decision Below, however, correctly found an initial impermissible Fourth Amendment interference with Respondent's personal liberty, an extension of that seizure by perjurious testimony during Gerstein proceedings, and a finding that the subsequent tainted prosecution foisted various burdensome conditions upon Respondent, including a restriction of his right to travel. The travel restrictions, as

part of the extension of the impermissible seizure, certainly had Fourth Amendment relevance since it was, in part, a measure of damages. (See Second Circuit majority opinion, Petition, pp A 12-14.)

As this Court noted in Attorney General of New York v. Soto Lopez, 476 US 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986), "Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution" citing, Dunn v. Blumstein, 405 US 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274 (1972) (quoting United States v. Guest, 383 US 745, 758, 86 S.Ct. 1170, 1178, (1966)).

More importantly, this Court in Soto recognized that "in light of the unquestioned historic acceptance of the principle of free interstate migration *** we have not felt impelled to locate this right definitively in any particular constitutional provision. (citation omitted) Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases (citations omitted)". Id.

Surely, therefore, the restriction of Respondent's fundamental right to migrate freely, arguendo, if not a Fourth Amendment seizure, is surely a violation of a specific, recognized federal right. See, Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979); Whiting v. Traylor, supra., perhaps sufficient, of itself, in conjunction with the other factors in the instant case, to support a Section 1983 claim.

Notwithstanding, where the damages herein included all the burdens attendant to a tainted prosecution following arrest (Whiting v. Traylor, supra at 584, n.4; Kelly v. Curtis, 21 F.3d 1544), restriction of the Respondent's fundamental

right to travel while on pretrial release is one of those burdensome conditions that effect a significant restraint of liberty of which this Court spoke in Gerstein, 420 U.S. at 114.

CONCLUSION

There is no conflict on the instant issue whatsoever among Circuits. Indeed, there is no claim or argument that a suit alleging Malicious Prosecution as a Fourth Amendment violation does not properly lie pursuant to 42 U.S.C. Sect. 1983 where, as here, there is a Police seizure without probable cause, which impermissible seizure is unbroken by a Gerstein hearing as a result of police perjury and otherwise tainted Grand Jury proceedings. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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